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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MIRA MAR MOBILE COMMUNITY
HOMEOWNERS ASSOCIATION, INC.,
et al.,

Plaintiffs, Cross-defendants, and
Respondents,

v.

KENDALL WEST LLC et al.,

Defendants, Cross-complainants, and
Appellants.

D055119

(Super. Ct. No. 37-2009-00050733-
CU-BT-NC)

APPEAL from an order of the Superior Court of San Diego County, Michael B.
Orfield, Judge. Reversed.

Defendants and appellants Kendall West LLC and Tower Communities LLC,
respectively owner and property manager of the Mira Mar Mobile Community (the park),
appeal from an order issuing a preliminary injunction in favor of plaintiffs and
respondents Mira Mar Mobile Community Homeowners Association, Inc. and one of its

tenants, Norman Kelley, (collectively Association). The preliminary injunction prohibits defendants from (1) increasing rents to \$850 per month effective February 1, 2009; (2) implementing a policy barring park residents from reselling their recreational vehicles or "park models" in place at the park; and (3) advertising rent increases to \$850 per month to prospective buyers of recreational vehicles, park models, and mobilehomes at the park. It required Association to post an undertaking of \$18,000.

Defendants seek reversal of the preliminary injunction on several independent grounds, including that in issuing the injunction, the trial court erred by failing to rely on a verified complaint, sworn affidavits or declarations. They further contend Association did not meet its burden to prove a probability of prevailing on the merits or that it would suffer greater relative interim harm on the injunction's denial than the harm resulting to defendants on issuance; the injunction is vague, overbroad and constitutes an unlawful prior restraint; and the \$18,000 undertaking is insufficient to remedy the damages suffered if the injunction is vacated.

We reverse the order and vacate the preliminary injunction. As to defendants' resale policy, Association cannot establish interim irreparable injury. The prohibition on advertising is both an invalid prior restraint and impermissibly vague. As for the validity of defendants' proposed rent increase, we conclude entry of preliminary injunctive relief was an abuse of discretion in the absence of a meaningful assessment of the relative hardships to each party due to the trial court's failure to consider all of the timely submitted evidence or the parties' evidentiary objections. Because a preliminary injunction merely preserves the status quo and is not a final adjudication on the merits,

our decision is, of course, without prejudice to Association's ability to renew or refile its motion with respect to defendants' proposed rent increase should circumstances warrant its consideration before the case can be heard and finally determined.

FACTUAL AND PROCEDURAL BACKGROUND

The facts are taken primarily from defendants' declarations in opposition to Association's applications for a temporary restraining order and preliminary injunction. Association purports to summarize the facts from the unverified complaint in this matter, which, as defendants point out, cannot serve as the factual basis for the trial court's order. (Code Civ. Proc., § 527, subd. (a).)

Defendants are the owner and property manager of the park, which is a senior community located in Oceanside, California. The park has 169 units, of which 95 are full size mobilehomes, 20 are "park models" and 54 are recreational vehicles (RVs). In October 2008, the park's property manager mailed two notices to certain park residents. The first advised park residents occupying an RV or park model that they did not have the right to sell their RV or park model "in place," but the park would allow them to do so to a buyer pre-approved by the park if the resident met specified requirements and the sale was completed on or before October 30, 2011. The second notice — sent to certain residents based on the park manager's determination that their leased space was not their principal residence and thus exempt from rent control — advised of a monthly space rent increase to \$850 effective February 1, 2009. That notice further advised residents that they had 90 days to submit documentation showing their space was subject to rent control.

In January 2009, Association filed an unverified complaint for damages and injunctive relief in which it set out causes of action against defendants for unfair competition under the UCL (Bus. & Prof. Code, § 17200 et seq.), interference with prospective economic advantage, violation of the Mobilehome Residency Law (MRL, Civ. Code,¹ § 798 et seq.), negligent and intentional infliction of emotional distress, breach of contract, fraud, negligent misrepresentation and declaratory relief. In part, Association alleged that tenants had purchased their units in reliance on material representations by defendants' representatives or agents who assured them that their units could be marketed and sold in place when or if the tenant sought to vacate. They alleged that defendants' proposed rent increase and rule as to the sale of in-place units were intended to force the tenants to remove their units from the park to support a new business model, rendered their units unmarketable, and violated the MRL as well as the tenants' rental agreements.

At the same time, Association filed an ex parte application for a temporary restraining order (TRO) seeking to prohibit defendants from implementing the rent increase and sales restrictions. It submitted declarations from its president, Jim Sullivan, and 19 other park residents, most of whom averred among other things that their lease or rental agreement contained a provision barring subleasing. According to Association, the subleasing ban in the agreements placed those units outside of a statutory exemption from rent control. Association also submitted a declaration from Kim Jorgenson, a licensed

¹ All statutory references are to the Civil Code unless otherwise indicated.

mobilehome salesperson with experience in purchasing and reselling in-place existing homes. In part, she explained why older mobilehome units removed from a park had no real market value in San Diego County.

Association thereafter obtained a TRO prohibiting defendants from increasing rents, implementing the sales limitations indicated in the October 2008 notices, and advertising the proposed rent increases. The court ordered defendants to appear and show cause why they should not be enjoined, and set a briefing schedule. That order was eventually dismissed, however,² and the court entered a new TRO enjoining the same conduct and ordering a new briefing schedule for a hearing on a preliminary injunction, which was to be held on March 13, 2009. The court's order in part required Association to file and serve reply papers, if any, on or before March 10, 2009.

² Defendants had moved to dissolve the TRO on grounds it was not set for hearing within 22 days from the date it issued, and also on grounds Association had not shown exigent circumstances for ex parte relief or any other substantive basis for an injunction. Association refiled its application (as well as the 20 supporting homeowner declarations) for an ex parte TRO at about the same time, which defendants opposed in part by asserting numerous evidentiary objections to the tenant declarations. The court dissolved the prior TRO on its own motion and granted a new TRO "based upon an analysis of the allegations that are being made." In doing so, it stated that it "didn't actually feel the need to take a look at any of those declarations, except the one of a homeowner that I took a look at. . . . It was on the top." The court further found Association had shown a probability of success on the merits on the cause of action for violation of the MRL; the legal remedy was inadequate due to the possible loss of the homes and money damages may not suffice; there would be irreparable harm before the matter could be heard without the TRO in place; the failure to issue a TRO could result in multiplicity of actions by the various homeowners; and the balance of harm would weigh in plaintiffs' favor without the TRO.

The day after the court entered the new TRO, Association filed a first amended complaint for damages and injunctive relief, which was also unverified. The City of Oceanside filed a complaint in intervention joining Association's request for declaratory and injunctive relief. In keeping with the new briefing schedule, Association served its application for a preliminary injunction. Summarizing the facts from its unverified complaint and pointing to Jorgenson's declaration as well as the 20 previously filed homeowner declarations, it argued a preliminary injunction was necessary to preserve the status quo because defendants' proposed rent increase and plan to restrict sales would cause irreparable harm to park tenants by making the units unmarketable or devaluing them to little or no value. Association argued the sales restriction conflicted with and breached the tenants' rental agreements; that each tenant had signed a rental agreement that the terms of resale of their homes would be restricted only if there was a " 'Park Upgrade' " and the defendants' notice of the restriction interfered with the tenants' ability to reconvey their homes. Association further asserted that defendants' proposals constituted an unreasonable restraint on alienation, and could not be applied retroactively to existing tenants. It argued that the tenants' rental agreements prohibited subleasing and thus under the MRL the units were not exempt from rent control.

Defendants opposed the proposed preliminary injunction on several grounds. They argued all of the spaces to which the rent increase was being applied were exempt from the city's rent control ordinances because past and present park rules and regulations, which were incorporated into the tenants' rental agreements, permitted

subletting.³ They further argued the sale restrictions were permissible because the Civil Code restrictions on mobilehome parks' rights to require removal on sale did not apply to recreational vehicles, including park models. Defendants pointed out Association's issue was not ripe for adjudication because the existing park tenants were not prohibited from selling their units in place as long as they completed their sale by October 30, 2011. Defendants finally argued Association had an adequate remedy at law in that tenants facing eviction could assert the validity of the rent increase and sale restriction as an affirmative defense in an unlawful detainer action. They asked the court to order Association to post a bond in the sum of \$276,000 — amounting to the difference in rents for the affected spaces for approximately 12 months — in the event it were to grant the preliminary injunction.

In addition to reply points and authorities, on March 10, 2009, Association filed an additional 52 declarations from various tenants assertedly demonstrating that their park unit was their primary residence. Defendants generally objected to all of the declarations on grounds they were untimely, irrelevant, and improperly based in part on information and belief, rendering them hearsay and without personal knowledge or foundation. They also submitted objections to each individual declaration.

The court issued a tentative ruling and the matter proceeded to oral argument. Defendants' counsel began his argument by suggesting that the trial court's tentative

³ Defendants pointed to the declaration of the park's property manager, Joe Orlandini, explaining that in March 2008, the park had adopted new rules and regulations allowing subletting. The rules prohibit residents from subletting unless they obtain the park management's consent under specified procedures.

ruling did not maintain the status quo, but rather was tantamount to a grant of relief after a trial on the merits. He proceeded to recount the procedural history of the matter, but the trial court interrupted: "Let me help you here, because it's to your advantage. Forget the 52 declarations. I'm not making any decision based on those declarations. I found it to be overwhelming and very difficult to digest. That's not part of my analysis as far as the preliminary injunction is concerned. So if that gives you assistance —

"[Defense counsel]: It does. As a result, I'm going to be able to chop down my oral argument.

"The Court: And I know you filed objections. And you can imagine, it's virtually impossible for me to take a look at a writing, stack of things this morning and be prepared this afternoon for them. But it was true. Even when I got it and was unable to deal with those objections, that it wasn't the declarations or the objections that was the heart of the case. [¶] It really was an analysis of the rent control act. Your take that, well, the rent control laws are not in place because this is not the primary residence and then the exception to the primary residence rule, yes, but if there are restrictions in the lease itself, then maybe the primary residence thing doesn't prevail. [¶] I'm taking a look at the legal analysis and saying to myself, I think that there is a, you know, a way that the plaintiffs can prevail in this case. I think that they've got an argument here. And that's just one of the prongs that I'm looking at as far as analyzing whether a preliminary injunction is going to go forward. [¶] Anyway, I wanted to clear that up because I know it might have

been a stickler for you and it really wasn't an issue. It wasn't a body of evidence that I considered that made an impact upon me as far as my decision was concerned."⁴

The colloquy continued, with defendants' counsel requesting evidentiary rulings on their objections for the record, not only as to the 52 declarations, but also on the declarations originally filed by Association. The court responded: "You make a good point. I think for your benefit, for the benefit of the plaintiffs, the tentative does state that the "broad objections . . . are overruled." The court went on to explain that the declarations in any event did not sway it with regard to its tentative decision; that they were not "truly germane to the legal issues that I had to ponder in analyzing whether or not to issue a preliminary injunction under the circumstances of this case." When counsel pressed the issue, the court remarked that the objections would be in the record for appellate review, and explained it "just was not possible to get through evidentiary objections" given the court's heavy calendar.

Ultimately, the court issued Association's requested preliminary injunction. It ordered defendants, their agents, employees, officers, representatives, successors, partners, assigns and all persons acting in concert or participating with them, from

⁴ Counsel then paraphrased the court as indicating it was "not going to consider the declarations." The court responded: "My apologies. Not that — I mean, I looked at them. But I did not have time, far too lengthy and not organized in a way that makes it easily digestible. But they weren't a part of the court's reasoning. They didn't lead the court to the court's conclusion by anything that was said in there about were we to do this, we would lose this and this. [¶] I'm sure they're well-meaning and they might be looking at certain losses. But your client is looking at losses, too. But I'm not taking that into account, either. That's not part of my legal analysis. I don't get to take that other than in looking at the prejudice one way or the other of granting or denying a writ . . . [¶] . . . [¶] for the preliminary injunction.

"directly or indirectly: [¶] A. Increasing rents on RV and Mobile Home spaces to \$850 per month effective February 1, 2009[,] from existing rents averaging \$350 per month as outlined in an October 30, 2008 letter to tenants from Joe Orlandini authorized agent of Mira Mar Mobile Community. [¶] B. Implementing the 'No Right to Sell RV/Park Model in place' policy as outlined in [the] October 30, 2008 letter from Joe Orlandini authorized agent of Mira Mar Mobile Community; and [¶] C. Advertising rent increases to \$850 per month to prospective buyers of recreational vehicles, park models and mobile homes in place at Mira Mar." It ordered plaintiffs to post an undertaking in the amount of \$18,000.

Defendants filed this appeal.

DISCUSSION

I. Sufficiency of Association's Evidentiary Showing

Defendants' first contention of error is strictly procedural: that the trial court abused its discretion and the preliminary injunction must be reversed because the court did not follow the dictates of Code of Civil Procedure section 527, subdivision (a),⁵ requiring it to rely upon either a verified complaint or sworn affidavits or declarations in issuing the injunction. Defendants point out Association did not file a verified complaint and the trial court declined to consider the various resident declarations because it based its ruling on an interpretation of the rent control ordinance. They argue the court's

⁵ Code of Civil Procedure section 527, subdivision (a) provides that a preliminary injunction may be granted "upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor."

interpretation of the ordinance cannot be used solely as the basis for the injunction because "if the interpretation did not apply to the Association itself based on the facts at issue, then there would be no grounds for injunctive relief." Defendants additionally assert that the provision preventing implementation of the "no right to sell in place" policy could not have been based on an interpretation of the rent control ordinance.

Though defendants contend issuance of the preliminary injunction is improper under any circumstance, they ask us to apply a de novo standard of review to the extent we conclude issuance of the injunction depends on an issue of law.

Defendants' arguments challenging the sufficiency of Association's factual showing are similar to those made in cases where the complaining party claimed the trial court acted in excess of its jurisdiction in issuing injunctive relief. (See e.g., *Harlan v. Superior Court* (1949) 94 Cal.App.2d 902 (*Harlan*), distinguished and clarified in *Signal Oil & Gas Co. v. Ashland Oil & Refining Co.* (1958) 49 Cal.2d 764, 776, fn. 5; *Ancora-Citronelle Corp. v. Green* (1974) 41 Cal.App.3d 146, 148-149 (*Ancora*).) In *Harlan*, the Court of Appeal found a trial court without jurisdiction to enter a temporary restraining order (on which the petitioner was adjudged guilty of contempt) because the court had not observed the verified pleading and affidavit requirements of section 527; the record disclosed "a complete absence of *any* factual showing by pleading or affidavit upon which the court could have based a finding of the existence or nonexistence of grounds for granting the temporary injunction." (*Harlan*, 94 Cal.App.2d at p. 905.) The court explained: "A verified showing is indispensable to the exercise of injunctive power under the rule that 'though the court has jurisdiction over the subject matter and the

parties in the fundamental sense, it has no "jurisdiction" (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.' " (*Ibid.*, italics omitted.) In *Signal Oil & Gas Co.*, the California Supreme Court clarified the *Harlan* court's conclusion that the situation was " 'not one where a question of law exists as to the sufficiency of the facts averred by the appellant ' " (*Signal Oil & Gas Co.*, at pp. 775-776 & fn. 5.) It explained that the court in *Harlan* must have meant to say the showing was insufficient as a matter of law because that determination — the sufficiency of the factual showing — was itself a question of law. (*Ibid.*)

In *Ancora*, *supra*, 41 Cal.App.3d 146, the appellate court reversed an injunctive order for lack of a verified complaint or affidavits or declarations under penalty of perjury establishing sufficient grounds for the injunction. The complaint and an amendment were not verified. The plaintiff's accountant had filed a declaration under penalty of perjury alleging that he was " 'familiar with the matters alleged in the complaint and first amendment . . . and based thereon knows that the allegations of said complaint and of said first amendment are *meritorious*.' " (*Ancora*, *supra*, 41 Cal.App.3d at p. 149.) The Court of Appeal held that recital insufficient, explaining a statement that a matter is "meritorious" was not equivalent to one that they are "true." (*Ibid.*) The *Ancora* court pointed out that " ' "[t]o issue an injunction is the exercise of a delicate power, requiring great caution and sound discretion, and rarely, if ever, should be exercised in a doubtful case." ' [Citation.] . . . [A]n injunction may issue *only* upon a satisfactory showing of sufficient facts *under oath*." (*Ancora*, 41 Cal.App.3d at pp. 148-

149; see also *Gray v. Superior Court* (2005) 125 Cal.App.4th 629, 640.) Under these authorities, a request for injunctive relief not supported by competent evidence must be denied.

Here, Association's original and first amended complaints were not verified, and accordingly the facts and assertions alleged therein cannot serve as the basis for a preliminary injunction. (Code Civ. Proc., § 527, subd. (a).) However, unlike the cases cited above, both Association and defendants submitted written supporting and opposing declarations to Association's motion. Such declarations, made under penalty of perjury, are the equivalent of an affidavit. (*Ancora*, 41 Cal.App.3d at p. 148, fn. 1.) In its motion for preliminary injunctive relief, Association cited to the 20 individual homeowner declarations, as well as Jorgenson's declaration, that were previously filed in support of its original TRO application.⁶ The trial court also had before it the declaration of defendant's property manager, who summarized the basic facts concerning the park's March 2008 rule change and its October 2008 notices concerning its proposed rent increase and change in resale policy. While the trial court expressly refused to consider Association's 52 additional declarations filed with its reply papers and overruled all of defendants' objections, it nevertheless had before it the original 20 homeowner declarations and Jorgenson's declaration. Indeed, later in the hearing the court demonstrated some knowledge about them when it said that the primary residence status

⁶ It is of no moment that the trial court issuing the TRO reviewed only one of the 20 homeowner declarations (see footnote 2, *ante*). It is sufficient — and we presume absent a showing otherwise — that the court hearing Association's request for a preliminary injunction had those declarations in the record before it.

of the homeowners "was the subject of the declarations that were filed and to which there were lots of objections." Thus, the circumstances here are unlike those in *Harlan, supra*, 94 Cal.App.2d 902, and *Ancora, supra*, 41 Cal.App.3d 146, where the parties seeking injunctive relief presented no competent evidentiary showing whatsoever and as a result made a request that was insufficient as a matter of law.

As for defendants' assertion that the court abused its discretion by overruling Association's evidentiary objections in a "blanket fashion," the contention is made in a footnote without any reasoned argument or citation to authority, and thus we treat the point as waived. (*Nelson v. Avondale HOA* (2009) 172 Cal.App.4th 857, 862.)

In sum, we are not convinced Association's showing so violated Code of Civil Procedure section 527 as to invalidate the preliminary injunction as a matter of law. Our conclusion, however, is not a determination that the trial court's reasoning was sound or that the Association's declarations and the remaining evidence in fact contain substantial evidence *supporting* its decision that Association is entitled to its requested relief. We assess those questions under the review standards set forth below.

II. *Validity of Preliminary Injunction*

A. *Nature of Relief/Standard of Review*

The general purpose of a preliminary injunction is to preserve the status quo pending a determination on the merits of the action. (*White v. Davis* (2003) 30 Cal.4th 528, 554; *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528.) Trial courts should evaluate two interrelated factors when deciding whether or not to issue a preliminary injunction: (1) the likelihood that the moving party will ultimately prevail on the merits at

trial and (2) the relative interim harm to the parties from the issuance or nonissuance of the injunction. (*White v. Davis*, at p. 554; *Butt v. State of California* (1992) 4 Cal.4th 668, 677-678.) " 'The ultimate goal of any test to be used in deciding if a preliminary injunction should issue is to minimize the harm which an erroneous interim decision may cause.' " (*White v. Davis*, at p. 554, quoting *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 73.) It is Association's burden to show all necessary elements. (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1481.)

We review an order granting a preliminary injunction under an abuse of discretion standard. (*Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1299 (*Alliant*); see also *Carsten v. City of Del Mar* (1992) 8 Cal.App.4th 1642, 1649.) Abuse of discretion as to either of the two interrelated factors warrants reversal. (*Ibid.*)

" 'In determining the validity of the injunction, we look at the evidence presented to the trial court to determine if there was substantial support for the trial court's determination that the plaintiff was entitled to the relief granted.' [Citation.] 'Where the evidence before the trial court was in conflict, we do not reweigh it or determine the credibility of witnesses on appeal. "[T]he trial court is the judge of the credibility of the affidavits filed in support of the application for preliminary injunction and it is that court's province to resolve conflicts." [Citation.] Our task is to ensure that the trial court's factual determinations, whether express or implied, are supported by substantial evidence. [Citation.] Thus, we interpret the facts in the light most favorable to the prevailing party and indulge in all reasonable inferences in support of the trial court's order.' " (*Alliant, supra*, 159 Cal.App.4th at p. 1300; see also *14859 Moorpark*

Homeowner's Ass'n v. VRT Corp. (1998) 63 Cal.App.4th 1396, 1402-1403 (*Moorpark*) [reviewing court will presume the trial court made appropriate factual findings in the absence of express findings and review the record for substantial evidence to support the rulings].) Where the determination on the likelihood of a party's success rests on an issue of pure law based on unconflicting evidence, we review the determination de novo. (*Moorpark*, at p. 1403.)

An order granting a preliminary injunction will be reversed only if in ruling on one of the factors, the trial court abused its discretion by exceeding the bounds of reason, i.e., where its decision has no reasonable basis or is contrary to the undisputed evidence. (*Moorpark, supra*, 63 Cal.App.4th at p. 1402.) We emphasize that the " 'granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy' " (*Continental Baking Co. v. Katz, supra*, 68 Cal.2d at p. 528; *IT Corp. v. County of Imperial, supra*, 35 Cal.3d at pp. 74, fn. 7 & 75-76) and our discussion should not be construed as addressing the merits of those issues.

B. *Interim Harm*

We begin by addressing the question of relative harms and equities, i.e., whether Association demonstrated it was likely to suffer greater injury from a denial of the injunction than the defendants were likely to suffer from its grant. (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 206.) Defendants contend Association did not make a sufficiently strong showing of interim irreparable injury. They maintain the balance of harms weighs in *their* favor given the injunction's breadth, and that because Association's showing on the merits is weak, it was required to make a strong showing of irreparable

harm. Defendants argue Association did not make such a showing by asserting — without citing to any proof — that seniors could not afford to pay or faced the "risk" of eviction, but even so, any issue as the validity of the proposed rent increase or resale policy could be asserted as affirmative defenses in an expedited unlawful detainer action. Asserting that these matters are questions of fact, defendants reiterate their arguments that Association did not cite to any factual evidence demonstrating irreparable harm, and that the court abused its discretion because it did not consider the parties' actual harms in any event.

1. *Resale Policy*

As to the resale policy, which Association contends constitutes a breach of each resident's rental agreement, we agree Association cannot establish irreparable interim injury.

A plaintiffs' showing of potential harm can be expressed as one involving the inadequacy of legal remedies or threat of irreparable injury, but "whatever the choice of words it is clear that a plaintiff must make some showing which would support the exercise of the rather extraordinary power to restrain the defendant's actions prior to a trial on the merits. [Citations.] In general, if the plaintiff may be fully compensated by the payment of damages in the event he prevails, then preliminary injunctive relief should be denied." (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1471-1472 (*Tahoe Keys*); see also *White v. Davis, supra*, 30 Cal.4th at p. 554 [a plaintiff seeking preliminary injunction ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an

injunction is not issued pending an adjudication of the merits]; *Abrams v. St. John's Hospital & Health Center* (1994) 25 Cal.App.4th 628, 636.) In *Tahoe Keys*, for example, the appellate court found no sufficient showing of irreparable harm to enjoin the collection of an assertedly unconstitutional regulatory fee because the fees could be refunded if the challengers prevailed. (*Id.* at pp. 1471-1472 & fn. 9.)

Here, there is no factual dispute about the nature of defendants' RV/park model resale policy: The park announced that under the MRL and Recreational Vehicle Park Occupancy Law (Civ. Code, § 799.20 et seq.), RV and park model owners did not have the right to sell their unit in place. The notice advised affected residents they would nevertheless be permitted to sell their units to pre-approved buyers if the resident (1) was an existing park resident; (2) was not in default in their rental agreement; (3) was in compliance with park rules and regulations; and (4) closed escrow on the sale of their RV/park model on or before October 30, 2011. Accordingly, at the time defendants advised existing residents of the policy, the residents had a three-year period in which to sell their units. Defendants argue these circumstances negate any possibility of interim irreparable harm since the matter will be tried and resolved before the policy is put in place. We agree that under these circumstances, Association may not be able to show *present or immediate* harm stemming from the policy.⁷ But more importantly, we

⁷ Defendants cite to *Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1084 for the proposition that preliminary injunctive relief must be based on more than the proponent's fears about some future activity, and that injury must be impending and immediately likely. But the court in *Korean Philadelphia* relied on case authority involving *permanent* injunctive relief,

conclude Association cannot show *irreparable* interim harm so as to justify preliminary injunctive relief.

In the trial court (and also on appeal), Association argued based on *Tahoe Keys*, *supra*, 23 Cal.App.4th at p. 1472, that an act precluding an owner from utilizing his property constitutes irreparable injury. In fact, as stated above, in *Tahoe Keys*, the court *rejected* a claim of irreparable injury stemming from collection of a mitigation fee that plaintiff claimed was unconstitutional and unfair, finding that legal damages would be "readily ascertainable." (*Tahoe Keys*, *supra*, 23 Cal.App.4th at p. 1472 & fn. 9.)⁸ Thus, *Tahoe Keys* does not support Association's broad proposition. And here, defendants' resale restriction does not impact the residents' present use and enjoyment of their homes. Without citing to any evidence in the record, Association argues the residents' units "have been devalued to such an extent they cannot be sold due to Owner's letter stating that RVs and Park Models cannot be re-sold in place." It is unclear to us whether this

which is not issued to maintain the status quo and is thus "very different from a pendente lite injunction" (See *Dawson v. East Side Union High School Dist.* (1994) 28 Cal.App.4th 998, 1041.) The trial court's discretion in issuing a permanent injunction is not nearly as broad as its discretion to grant preliminary injunctive relief. Because as to the resale restriction we base our conclusion on the lack of irreparable harm, we need not decide whether *Korean Philadelphia* is good authority in the context of a request for preliminary injunctive relief.

⁸ Further, in assessing harm, the *Tahoe Keys* court declined to consider the plaintiff's argument that the fee was unconstitutional and thus owners would be "compelled to suffer, at least temporarily, the payment of an unconstitutional fee." The court stated that point was part of the likelihood of prevailing factor; that it was inappropriate to "presume irreparable injury or the inadequacy of legal remedies based simply on assertion of a constitutional theory for relief." (*Tahoe Keys*, *supra*, 23 Cal.App.4th at p. 1472.) Association similarly sets out improper merits-based arguments in support of its claim of irreparable harm.

statement demonstrates damage to *Association* as a consequence of defendants' sales policy.⁹ There is no reason to further address the assertion absent citation to the record. But even assuming the record contains evidence that units have suffered losses in value due to defendants' imposition of its resale restriction or that the restriction caused a resident to lose a sale, such legal injuries are ascertainable and can be established by testimony at trial. Such injuries would therefore be adequately compensated by a judgment for money damages. (See *Jessen v. Keystone Savings & Loan Assn.* (1983) 142 Cal.App.3d 454, 458 [injunctive relief inappropriate to prevent foreclosure on condominium units; absent some showing of unique characteristics or intrinsic value, loss of units would be adequately compensated in damages]; accord, *Abrams v. St. John's Hospital & Health Center*, *supra*, 25 Cal.App.4th at p. 640 [where a judgment for money damages is available there is no irreparable harm]; see *Ajaxo Inc. v. E*Trade Group, Inc.* (2005) 135 Cal.App.4th 21, 55-56 [breach of contract remedies may include money damages, which are calculated with the purpose of "putting the injured party in as good a position as he would have occupied had the contract been performed"]; *Simms v. NPCK*

⁹ Issues as to Association's standing to seek preliminary injunctive relief on behalf of park tenants were not raised in defendants' opposition briefing in the trial court, though the matter was suggested during arguments on the preliminary injunction hearing by reference to tenants potentially being "indispensable" parties. Given our disposition, defendants will have an opportunity to raise standing issues, if there be any, following remand. (See *Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 813 [because standing goes to the existence of a cause of action and the court's jurisdiction "lack of standing may be raised by demurrer or at any time in the proceeding, including at trial or in an appeal"].)

Enterprises, Inc. (2003) 109 Cal.App.4th 233, 243 ["The existence of another effective judicial remedy is grounds for denying injunctive relief"].)

Though we are bound to infer the trial court found the balance of harm weighed in Association's favor, we find no evidence in the record demonstrating interim and irreparable harm resulting to Association from defendants' resale policy for RVs and park models. Because the trial court's implied finding is not supported by the evidence — and in fact contravenes the uncontradicted evidence concerning the nature and implementation of defendants' policy — we conclude it abused its discretion by enjoining defendants' implementation of that policy. (*IT Corp. v. County of Imperial, supra*, 35 Cal.3d at p. 69.)

2. Proposed Rent Increase

As for defendants' proposed rent increase, we are compelled to conclude the trial court erred by neglecting to meaningfully consider and balance the relative hardships that would result by granting or denying the preliminary injunction. (See *White v. Davis, supra*, 30 Cal.4th at pp. 560-561.) "Although the trial court has broad discretionary powers to grant or deny a request for a preliminary injunction, it has 'no discretion to act capriciously.' [Citation.] It must exercise its discretion 'in favor of the party most likely to be injured.' " (*Robbins v. Superior Court, supra*, 38 Cal.3d at p. 205.)

Under the circumstances, the assessment of the relative harms was a fact-dependant inquiry — requiring an assessment of the hardship or threat of injury Association would likely suffer on denial of the preliminary injunction and those injuries defendants would likely suffer upon its grant. (*White v. Davis, supra*, 30 Cal.4th at p.

554.) According to Association's moving papers below, alleged hardships presented by the proposed rent increase consist of residents' inability to sell their units because prospective buyers are informed of the proposed increase, and the fact other owners "will be forced out of their homes" and lose all equity in them, presumably because they are unable to pay \$850 in rent and will ultimately default on their rental agreements. On appeal, Association further maintains owners will have to "*immediately* locate replacement housing or seek State assistance for housing and support." The latter point is entirely without record citation. Setting that deficiency aside, evaluating these hardships requires an examination of each resident's personal circumstances. But, as we have summarized above, the trial court expressly stated that the parties' declarations were not germane to the issues before it; they did not "sway" it one way or another and it did not "take[] [the parties' losses] into account" as part of its legal analysis. The court's failure to consider the record evidence on the issue of relative harms rendered its decision an abuse of discretion. (*White v. Davis*, at p. 560 ["In granting a preliminary injunction without considering the relative harms that would be imposed by denying or granting a preliminary injunction, the trial court erred"]; accord, *O'Connell v. Superior Court*, *supra*, 141 Cal.App.4th at pp. 1469-1473 [trial court disregarded important record evidence on the issue of respective harms; its failure to consider and balance the harm from granting the injunction and failure to give due consideration to the obligation to preserve the status quo were sufficient error to vacate the preliminary injunction].)

We acknowledge case law holding, based on federal authorities, that a trial court "could presume irreparable injury" based on a showing of likelihood of success on the

merits. (See *Jay Bharat Developers, Inc. v. Minidis* (2008) 167 Cal.App.4th 437, 443-444.)¹⁰ In *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, the California Supreme Court stated that the presence or absence of the two interrelated factors — likelihood of success on the merits and balance-of-harms — is "usually a matter of degree, and if the party seeking the injunction can make a sufficiently strong showing of likelihood of success on the merits, the trial court has discretion to issue the injunction notwithstanding that party's inability to show that the balance of harms tips in his favor." (*Id.* at p. 447.) However, in *White v. Davis*, the California Supreme Court clarified its statement in *Common Cause*, stating it "did *not* suggest that when a party makes a sufficient showing of likely success on the merits a trial court need not consider the relative balance of hardships *at all* or that when the balance of hardships dramatically favors the denial of a preliminary injunction a trial court nonetheless may grant a preliminary injunction on the basis of the likelihood-of-success factor alone." (*White v. Davis, supra*, 30 Cal.4th at p. 561.) In *White*, the record showed that the trial court had

¹⁰ The California Supreme Court in *IT Corp. v. County of Imperial, supra*, 35 Cal.3d 63 also applied a presumption of harm in cases where a government entity seeks to enjoin an alleged violation of an ordinance that itself specifically provides for injunctive relief. (*Id.* at pp. 69, 72.) The court stated as a general principle: "[I]f it appears fairly clear that the plaintiff will prevail on the merits, a trial court might legitimately decide that an injunction should issue even though the plaintiff is unable to prevail in a balancing of the probable harms." (*Id.* at p. 73.) The presumption of public harm was rebuttable; indeed, the court specifically rejected case law adopting a conclusive presumption in a closely analogous factual context. (*Id.* at p. 73, fn. 6.) In this appeal, we are not presented with a situation of a government entity seeking to enjoin the violation of such an ordinance. Though the city of Oceanside had intervened below and submitted briefing in which it sought to prevent defendants from charging or collecting rents in excess of space rent ceilings approved by the Manufactured Home Fair Practices Commission, it has not appeared or made these arguments on appeal.

not given any indication it had considered or weighed the hardships, but granted a preliminary injunction simply upon its agreement with the merits of the plaintiff taxpayers' constitutional claim for unlawful expenditures of public funds. (*Id.* at p. 560.) Finding error in the trial court's failure to consider relative harms (*ibid*), *White* went on to hold that the relative hardships favored denial of the injunction, but even if they were more "evenly balanced," it could not uphold the injunction because the plaintiff taxpayers in that case had not made a strong showing that they were likely to prevail on the merits: there was a "lack of clear authority supporting the merits of plaintiffs' broad claim." (*Id.* at pp. 557, 561-562.) Under the circumstances, it held the trial court abused its discretion in granting a preliminary injunction. (*Id.* at pp. 561-562.)

The record does not permit us to presume the trial court balanced the parties' relative hardships and found irreparable harm favoring Association in view of a record showing it expressly gave no weight to the very evidence underlying those determinations. The trial court should have carefully considered all of Association's declarations, including Association's 52 reply declarations, which were filed in compliance with the trial court's briefing schedule, as well as the parties' evidentiary objections. While a reviewing court must indulge every intendment and presumption in favor of the trial court's order, we cannot draw a presumption that is contradicted by or inconsistent with the appellate record. (Cf. *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 261, citing *Walling v. Kimball* (1941) 17 Cal.2d 364, 373.) Absent an indication that the trial court actually engaged in the necessary balancing of harms stemming from the proposed rent increase, we are compelled to conclude it abused its discretion in

granting provisional relief. Because we do not reach the likelihood of prevailing prong, we need not address defendants' request that we take judicial notice of former section 798.23. Even if we were to grant judicial notice of the former statute, it would not impact our decision.

As we have emphasized, a preliminary injunction merely preserves the status quo and is not a final adjudication on the merits. Thus our decision is without prejudice to Association's ability to renew or refile its motion with respect to defendants' proposed rent increase should circumstances warrant its consideration before the case can be heard and finally determined.

C. Prohibition on Advertising Rent Increase to Prospective Buyers

We turn to the "no advertising" component of the injunction. Even assuming that aspect of the injunction does not fall in light of the foregoing conclusions, it must be reversed as both an unconstitutional prior restraint and impermissibly vague and overbroad.

This court recently explained, "An injunction that forbids a citizen from speaking in advance of the time the communication is to occur is known as a 'prior restraint.' [Citations.] A prior restraint is 'the most serious and the least tolerable infringement on First Amendment rights.' " [Citations.] Prior restraints are highly disfavored and presumptively violate the First Amendment. [Citations.] This is true even when the speech is expected to be of the type that is not constitutionally protected." (*Evans v. Evans* (2008) 162 Cal.App.4th 1157, 1166-1167.) In *Evans*, we recognized that an order prohibiting a party from making or publishing false statements is a "classic type of an

unconstitutional prior restraint" except in cases where an order issues following a trial prohibiting a defendant from repeating specific statements found to be defamatory. (*Id.* at p. 1168.) In assessing the propriety of a request for an injunction on such speech, the timing of the request is crucial, since " '[t]he attempt to enjoin the initial distribution of a defamatory matter [prior to trial] meets several barriers, the most impervious being the constitutional prohibitions against prior restraints on free speech and press. . . .' " (*Ibid.*)

At least one court has noted that though the question may be open under federal law, under the California Constitution, the imposition of a prior restraint on commercial speech bears the same presumption of unconstitutionality and carries the same heavy burden of justification as does a prior restraint on other forms of protected expression. (*Parris v. Superior Court* (2003) 109 Cal.App.4th 285, 297.)

Here, the preliminary injunction barring defendants from "[a]dvertising rent increases to \$850 per month to prospective buyers of recreational vehicles, park models and mobile homes in place at Mira Mar" is an unconstitutional prior restraint. (See *Evans v. Evans, supra*, 162 Cal.App.4th at p. 1169.) Association's arguments do not convince us otherwise. It maintains the injunction cannot be a prior restraint because the assertion as to rents is untrue in that rents were not so increased. But the assertion has not been judicially determined to be untrue, and it remains a prior restraint under the above principles. Association alternatively argues it has shown strong countervailing interests and necessity, namely, that owners are being "denied the opportunity to sell their units" due to the increase, and management should not mislead the public by advertising a rent increase that has not been implemented. It points to no evidence to support the

factual premises of these assertions and no case authority that these kinds of interests are sufficiently compelling to justify a prior restraint. We do not find them to be compelling interests of the *Association* in any event.

The advertising component of the injunction is also invalid because it is not sufficiently precise or narrowly drawn. "Even if an injunction does not impermissibly constitute a prior restraint, the injunction must be sufficiently precise to provide a 'person of ordinary intelligence fair notice that his contemplated conduct is forbidden.'

[Citations.] An injunction is unconstitutionally vague if it does not clearly define the . . . conduct prohibited." (*Evans v. Evans, supra*, 162 Cal.App.4th at p. 1167.) Here, the order does not define the term "advertising." The term, plainly understood, may apply to both commercial and noncommercial speech. (*Showing Animals Respect and Kindness v. City of West Hollywood* (2008) 166 Cal.App.4th 815, 819.) "The term 'advertise' is not limited to calling the public's attention to a product or a business. The definition of 'advertise' is more general: 'to make something known to[;] . . . to make publicly and generally known[;] . . . to announce publicly *esp[ecially]* by a printed notice or a broadcast' [Citation.] Thus, although the subject of the matter brought to notice may be commercial, it is not necessarily so." (*Id.* at pp. 819-820, quoting Merriam-Webster's Collegiate Dict. (10th ed., 1995) p. 18.) Without a definition, the injunction is not sufficiently clear to determine whether Association's rights substantially outweigh defendants' free speech rights. (Cf. *Evans v. Evans*, at p. 1170.) Likewise, the information does not provide defendants with a reasonable basis to understand what they were prohibited from doing. (*Ibid.*)

D. *Bond*

Because we reverse the trial court's order granting the preliminary injunction, we need not resolve defendants' contentions concerning the amount or sufficiency of the undertaking. (See *White v. Davis* (2002) 108 Cal.App.4th 197, 235.) However, in the event Association seeks to renew or refile its motion, we point out that defendants are not only entitled to a bond as an "indispensable prerequisite" (*ABBA Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 10), but the undertaking must be in an amount sufficient to pay them "any damages . . . as [they] may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction." (Code Civ. Proc., § 529, subd. (a).) When estimating the amount of the required undertaking, the trial court must assess defendants' damages *under the assumption that the preliminary injunction was wrongfully issued* (*ABBA Rubber*, 235 Cal.App.3d at p. 15) and thus consider not only defendants' potential losses in rent, but its reasonable attorney fees and expenses incurred in procuring a final decision dissolving the injunction. (*ABBA Rubber*, at pp. 15-16; *Greenly v. Cooper* (1978) 77 Cal.App.3d 382, 390.)

DISPOSITION

The order is reversed. The parties shall bear their own costs on appeal.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.